

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027

**ADMINISTRATIVE LAW JUDGE'S RULING ON  
MOTION OF THE OFFICE OF RATEPAYER ADVOCATES  
AND THE UTILITY REFORM NETWORK  
TO STRIKE DECLARATIONS AND TESTIMONY**

This ruling addresses the motion filed on July 19, 2005 jointly by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) to strike certain specified declarations and testimony of witnesses, as follows.

1. The Declarations of Dennis W. Carlton and Hal. S. Sider dated February 21, 2005, and attached to the Application, and dated May 9, 2005, filed as an attachment to the Rebuttal Testimony of Professor Aron.
2. The Declaration of David Toti dated June 13, 2005 filed as an attachment to the Rebuttal Testimony of Professor Aron.
3. Questions 17 to 25, inclusive, of the Rebuttal Testimony of James Kahan.
4. The testimony of any of Joint Applicants' witnesses who are not being offered for cross-examination testimony under oath

in person in San Francisco in this proceeding. This would include the declarations of Messrs. Carlton, Sider, and Toti above, as well as the declarations of Hossein Eslambolchi, and Thomas Horton, dated February 21, 2005 and filed with the supplemental Application. Statements by individuals who will not subject themselves to cross-examination should not be included in the record.

5. The expert opinion testimony of witnesses who are not being offered as experts, such as portions of John Polumbo's Rebuttal Testimony.

**Declarations of Dennis W. Carlton, Hal. S. Sider, and David Toti**

ORA and TURN move to strike the declarations of Dennis W. Carlton, Hal. S. Sider, and David Toti, which are attachments to the Rebuttal Testimony of Dr. Aron. This material is offered for the truth of the matters asserted but the witnesses are not appearing in this proceeding.

ORA and TURN object to the inclusion of these declarations in the evidentiary record without an opportunity to cross-examine the authors of the declarations. The Rebuttal Testimony of Dr. Aron calls upon the Reply Declaration of Dennis W. Carlton and Hal. S. Sider, filed in the FCC proceeding reviewing this transaction (Carlton/Sider Declaration). Yet, ORA and TURN contend that Dr. Aron does not adopt the declaration as part of her testimony, and does not state that she has independently examined any the materials relied upon by the experts who prepared this declaration. ORA and TURN contend that the material will not be verified at the hearing.

Applicants concede that the Rebuttal Testimony of Dr. Aron relies on the Declarations of Messrs Sider, Carlton and Toti (Opposition at 4), but are not producing those declarants for cross examination in this proceeding. Applicants contend that it is sufficient for ORA and TURN to cross-examine Dr. Aron about these statements by third parties.

However, in a response to a Data Request from Qwest, Applicants stated that Dr. Aron did not review or even see the “workpapers, studies, analyses and data” on which Messrs Sider and Carlton relied, so Dr. Aron could not competently answer questions about their results. (See Attachment 1 to the Motion.)

ORA and TURN also contend that the Evidence Code refutes Applicant’s contention that testimony from Dr. Aron would be sufficient. Where an expert relies on the opinions or statements of others, as here, those others may be called and examined by any adverse party.<sup>1</sup> (Evid. Code, § 804(a).) Yet Applicants are not willing to allow these witnesses to be examined. For example, Applicants’ response to ORA Data Request Set No. 17, questions, 20 and 24 (Attachments 1 and 2 to ORA/TURN motion) refuse to provide details of the compensation of Sider and Carlton on the grounds that they are “not testifying” in this matter.

Dr. Aron also relies on the Declaration of David Toti, filed in the FCC’s Special Access NPRM (Toti Declaration). ORA and TURN object to the admission of the Toti Declaration without an opportunity to cross-examine him. Neither ORA nor TURN has received any indication that Toti will testify before this Commission.

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<sup>1</sup> Evidence Code § 804(b) states that the section does not apply when the “other” declarant is a “person identified with a party,” but this is only because the statute is primarily designed to provide cross-examination rights when an adverse party itself calls the “other” declarant; no such further statutory authority to cross-examine is required when an adverse party calls a party-identified witness. In any event, the Commission only looks to the Evidence Code for guidance when its own Rules are silent, and the point here is that the Evidence Code recognizes that there is often a need to subject such “other” declarants to cross-examination.

In the alternative, ORA and TURN argue that only the specific passages of the Carlton, Sider, and Toti declarations actually relied on by Dr. Aron in developing her expert opinion should be allowed into the record. As to Messrs. Carlton and Sider, ORA and TURN argue that only those references on pages 82, 83, and 85 of Dr. Aron's testimony should be allowed. Because Dr. Aron does not cite any specific reference to Toti (see p. 88), ORA and TURN argue that his declaration should be excluded entirely.

Applicants argue that including these declarations is appropriate under Commission practice and rules,<sup>2</sup> and are consistent with the Evidence Code, which provides that an expert may form admissible opinion based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates...."<sup>3</sup>

Applicants dispute the claim of ORA and TURN of having no opportunity to test the material relied upon by Dr. Aron other than by questioning Dr. Aron. ORA and TURN have already had the opportunity to test this material in discovery, and may use Applicants' discovery responses related to expert and analyst reports cited in her testimony to question Dr. Aron. Similarly, Applicants may use discovery responses and other publicly available information to question, for example, Dr. Selwyn's use of Prof. Wilkie's report,<sup>4</sup>

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<sup>2</sup> The sworn Declarations here satisfy the certification requirements under the Commission Rule 69(b).

<sup>3</sup> Cal. Evid. Code § 801(b). The Commission admittedly does not always strictly apply the Evidence Code, but its Rules of Practice and Procedure provide for the same result.

<sup>4</sup> See Selwyn Reply Testimony, pp. 68-69 and 163-64.

which was submitted to the FCC in the same manner as the two Declarations ORA and TURN seek to strike.

## **Discussion**

It is ruled that, in principle, those portions of the referenced declarations that have not been independently reviewed by Dr. Aron should be stricken from the record. Only the specific portions of the Carlton, Sider, and Toti declarations actually reviewed by Dr. Aron in developing her expert opinion should remain in the record. Dr. Aron states that she has reviewed Carlton and Sider's "methods data and results in sufficient detail to assure myself that the analysis is up to my own standards..." Dr. Aron does not say, however, that she has independently verified the assertions made in the Carlton/Sider Declaration, nor does she state that these economists work for her, or prepared material under her direction.

Moreover, those portions of the declarations that remain in the record will be given limited weight, taking into account that the authors of the declarations are not being made available for cross-examination, and that the statements have not been independently verified by Dr. Aron. Their weight will be limited to providing a more complete understanding of the factors and analyses that Dr. Aron took into account in forming her own independent conclusions.

ORA and TURN locate references only on pages 82, 83, and 85 where Dr. Aron indicates her reliance on the Carlton and Sider declarations, and locate no references to the Toti declaration. It is not clear precisely what portions of the declarations specifically apply to the references. Moreover, through cross-examination of Dr. Aron, it is possible that Applicants' discovery responses related to the declarations cited in her testimony might be introduced as

evidence. Such additional evidence may form the basis for a more accurate assessment of which portions of the declarations should be stricken.

Accordingly, a final determination on the specific portions of the declarations to be stricken will be deferred until the conclusion of the cross-examination of Dr. Aron.

**Questions 17 to 25, inclusive, of the Rebuttal Testimony of James Kahan**

ORA and TURN also move to strike Answers 17 to 25 of James Kahan's Rebuttal Testimony which describe the National Synergy Model. This testimony provides information and context about the model, for example, a description of how "key assumptions" were developed. ORA and TURN claim this information should have been provided in opening testimony, or when information derived from the model was first submitted. Rule 74.3(b). ORA and TURN argue that this information should not be provided for the first time in Rebuttal Testimony, and should therefore be stricken.

ORA and TURN claim that Applicants have not previously provided a clear statement of the assumptions and inputs of this model, as required by Rule 74.3, and that their statements that they did, in fact, provide a Rule 74.3 disclosure are unsupported by any written evidence. ORA and TURN claim that the purported oral disclosure did not name names, inputs or assumptions, or provide even the level of information provided in Kahan's Rebuttal.

Applicants dispute ORA and TURN's claim that the information in Kahan's testimony concerning the synergies model was "provided for the first time in Rebuttal Testimony." Applicants contend that they have responded to hundreds of data requests related to the development of the Models throughout this proceeding, and ORA and TURN later addressed these issues in their reply

testimony. Applicants thus argue that Answers 17 through 25 should remain in the record, as they directly counter ORA and TURN's testimony.<sup>5</sup>

### **Discussion**

It is concluded that ORA and TURN have not justified striking Answers 17 to 25 of James Kahan's Rebuttal Testimony which describe the National Synergy Model. Although ORA and TURN remain unsatisfied with the nature and extent of information about the model that was made available prior to the mailing of the Kahan testimony, their dissatisfaction does not rise to a level warranting the striking of the Kahan testimony. ORA and TURN are free to raise issues over the adequacies of Applicants' discovery responses and subsequent showing in the Kahan testimony in arguing as to any negative inferences that they believe should be drawn, and how evidence should be weighed or interpreted. In the interests of a complete record, however, the Kahan testimony shall not be stricken.

### **Testimony of Joint Applicant Witnesses not Being Offered for Cross-examination Testimony Under Oath in Person**

ORA and TURN also move to strike the following : (1) Declaration from Messrs. Carlton and Sider, submitted with the Joint Application; (2) Declaration of Hossein Eslambolchi, filed as Exhibit 3 to the Original Application; and (3) Declaration of Thomas Horton in support of the Supplemental Application (Exhibit 2). Because these statements were provided by individuals who did not submit testimony and who will not be subject to cross-examination, ORA and

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<sup>5</sup> The motion cites Rule 74.3(b) for the proposition that this information should have been provided earlier, but the ALJ has already denied ORA's motion contending that Applicants have not complied with Rule 74.3(b).

TURN argue that their Declarations cannot be relied upon, and should be stricken from the record.

Applicants respond that they submitted these Declarations not as testimony, but as part of their Application and other pleadings to satisfy the Commission's standards.<sup>6</sup> Both ORA and TURN have conducted extensive discovery regarding these Declarations,<sup>7</sup> and have submitted reply testimony addressing the Declarants' contentions. On that basis, Applicants argue that ORA and TURN have not been denied due process with respect to these Declarations.

Applicants also argue that there is no requirement that the Commission hold hearings in every case, and that it often issues decisions based upon comments and declarations. Applicants argue that the Commission traditionally forgoes evidentiary hearings entirely in proceedings to evaluate the transfer of certificated affiliates, demonstrating that cross-examination is not always necessary.

## **Discussion**

Applicants have included these declarations in their application filing, but will not be moving them into evidence as testimony. Accordingly, it is not necessary to strike them in order to keep them out of the formal evidentiary

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<sup>6</sup> Commission Rule of Practice and Procedure Rule 35 requires the Application to contain data regarding "(a) The character of business performed and the territory served by each applicant.... (c) Detailed reasons upon the part of each applicant for entering into the proposed transaction, and all facts warranting the same....[and] (e) Other pertinent facts."

<sup>7</sup> TURN data requests 4-29, 4-30, and ORA data requests 10-1 through 10-13 sought information related to these Declarations.



record. On the other hand, since the declarations will not be part of the formal evidentiary record, they may not be cited as authoritative support to prove claims about the proposed merger made by Applicants.

In response to the argument of ORA and TURN that the authors of the declarations are not being made available as witnesses at the evidentiary hearings, Applicants argue that there is no requirement that the Commission hold hearings in every case. Yet, the fact is that the Commission has determined to hold hearings in this case. Applicants may not circumvent the hearing requirement by trying to submit de facto testimony without an expert witness to sponsor it.

Accordingly, it is ruled that the declarations attached to the application and supplemental application do not constitute evidence. Such declarations shall merely be treated the same as any other statements set forth in the application filing and supplement thereto, none of which constitute testimony and none of which will not be given evidentiary weight as proof of the matters asserted therein. Accordingly, the ORA and TURN motion to strike the declarations attached to the application and supplement thereto is denied, with the understanding that the declarations are not evidence, and may not be used as authoritative support, nor to circumvent the evidentiary hearing requirement, as explained above.

### **Rebuttal Testimony of Pumbo**

ORA and TURN also move to strike the Rebuttal Testimony of John Pumbo, at Answers 9-11, based on the argument that it offers expert opinions, not fact. ORA and TURN argue that this testimony should be stricken unless these witnesses determine that they can qualify as experts.

ORA and TURN move to strike Polumbo's Answer 10, to the effect that "AT&T has little ... future competitive significance in the mass market," and that "AT&T's current position in the mass market is in no way a harbinger of AT&T's future significance as a competitor for mass market services." ORA and TURN argue that Answer 10 should be excluded as expert opinion about future occurrences because it is not percipient testimony. Polumbo is neither a lawyer nor an economist (his testimony asserts a BA degree in Social Sciences, further study in education, and a "MS degree in Management"). ORA and TURN assert that he is not in any event being offered as an expert.

For the same reasons, ORA and TURN move to strike Polumbo's Answer 11, rebutting economist Selwyn's expert testimony by asserting that there will be "No ... competitive void in the market ... when AT&T disappears as a stand-alone long-distance service." Likewise, they move to strike his Answer 9, in which he states that there is "No ... basis for Commission to Conclude that AT&T Remains a Significant Competitor to SBC in Consumer and Small Business Local Exchange and Toll Market."

Applicants respond that Polumbo's testimony is proper percipient witness testimony that satisfies the Commission's standards.

Applicants argue that Polumbo's twenty years' experience in the telecommunications industry, including senior executive positions, prior to his service at AT&T, fully qualify him to discuss AT&T's position in the consumer marketplace. Applicants argue that a witness that has experience, education,

training or other qualifications may offer a relevant opinion that is based on matters personally observed.<sup>8</sup>

### **Discussion**

The motion to strike the Polumbo testimony, Answers 9-11 is denied. ORA and TURN have not demonstrated the Polumbo is unqualified to sponsor the testimony at issue. Polumbo's industry experience, as summarized by Applicants, appears to reflect sufficient qualifications to testify to the matters in Answers 9-11. ORA and TURN are free to argue in briefs that less weight should be given to Polumbo's testimony because of their perception of deficiencies in his academic or professional credentials. On the other hand, ORA and TURN have not provided sufficient grounds for the extreme measure of striking the testimony based on the claim that he is unqualified to testify to the matters at issue.

### **Kahan Testimony**

Finally, ORA and TURN claim that Exhibit 1 to Kahan's direct testimony also crosses the line of what is permissible testimony for a percipient witness. Kahan attaches a report to his testimony, identified as Exhibit 1, entitled "Trends in the Competitive Communications Market in California." Kahan asserts that he neither authored the report nor knows the author. Likewise, he does not state that it is a source typically relied on in his industry. Given these deficiencies, ORA and TURN move to strike argue that its admission would be impermissible for any witness, let alone a percipient witness.

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<sup>8</sup> California Practice Guide: Civil Trials and Evidence §8:625.

Applicants object, claiming that ORA and TURN wrongly give the impression that they do not know the source of the document, and, as a result, that they will be prejudiced if the document is admitted. Applicants argue that they have provided responses to 44 data requests (not counting subparts) about this document, beginning in May.<sup>9</sup> In addition to the discovery responses, Applicants claim that the document itself includes extensive citations to FCC and industry analyst reports, most of which are publicly available, so that TURN and ORA may assess the reliability of the information published by those organizations. Applicants argue that this report is no different from dozens of other documents analyzing the competitive marketplace in both Applicants' and protestants' testimonies. They claim there is thus no justification for striking this report, and only this report, from the record.

### **Discussion**

The motion of ORA and TURN to strike Exhibit 1 of the Kahan direct testimony, as identified above, is denied. ORA and TURN have not provided sufficient basis to strike the document. The witness has apparently reviewed and relied upon the information in the document in presenting his testimony. Although the author of the document is not known, Applicants have answered 44 data requests about the document. ORA and TURN thus will be able to test the witness' basis for reliance on the document, and appropriate evidentiary weight that should be accorded the document through cross examination.

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<sup>9</sup> TURN data requests 6-16, 6-45 through 6-82, 8-7, 8-8, 8-10, 8-11, 8-13. These questions seek information about the author (as ORA and TURN suggest is necessary), the audience and its use of the report, particular data sources and Applicants' contentions about specific matters addressed in the exhibit. Applicants indicate they have fully responded to these requests.

**IT IS RULED** that the motion of ORA and TURN to strike is granted, in part, and denied, in part, as set forth in the discussion above.

Dated July 27, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Motion of the Office of Ratepayer Advocates and The Utility Reform Network to Strike Declarations and Testimony on all parties of record in this proceeding or their attorneys of record.

Dated July 27, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.